

RACING APPEALS TRIBUNAL

RAT 17/09

RAT 18/09

DATE: FRIDAY, 6 NOVEMBER 2009

TRIBUNAL: **PRESIDENT:** MR C R LEE

ASSESSOR: MR G PRETTY

**MR G LOCH, CHAIRMAN OF STEWARDS,
THOROUGHbred RACING SA LTD**

APPELLANT: MR B CLARIDGE

**MR D O'KEEFFE APPEARS FOR APPELLANT (BY
LEAVE)**

IN THE MATTER of Appeals by **BEN CLARIDGE** against decisions of
Thoroughbred Racing SA Ltd Stewards.

BREACH OF RULES: ARR 137A(5)(a)(i) and (ii)

Rule 137A(5)(a) *In a race, official trial or jump-out prior to the 100 metre
mark:*

- (i) The whip shall not be used in a forehand manner in
consecutive strides; —*
- (ii) The whip shall not be used in a forehand manner
more than on 5 occasions.*

PENALTY FINE OF \$500 (RAT 17/09)
SUSPENSION OF LICENCE FOR 3 MEETINGS
(RAT 18/09)

DETERMINATION

At successive meetings at Morphettville on 3rd and 5th October 2009, the
Stewards charged the Appellant with breaches of sub-rules (5) (a) (i) and (ii) of
rule 137A of the Australian Rules of Racing.

These sub-rules are part of a new set of rules known as the whip rules. Although the new whip rules date back to 1st August 2009, the current rules contain amendments which took effect from 26 September 2009.

The charge on 3rd October 2009 was that, whilst riding SATARA in race 5, the Appellant used his whip in a forehand manner prior to the 100 metre mark on five consecutive occasions and on eight occasions in all. The Appellant pleaded guilty and was fined \$500. His appeal is against the severity of the penalty.

The charge on 5th October 2009 was that, whilst riding FASTIZIO in race 5, the Appellant used his whip in a forehand manner prior to the 100 metre mark on nine occasions in addition to the five occasions permitted by the rule. The Stewards treated the Appellant's response as a plea of not guilty, found the charge proved and suspended his licence to ride for three meetings. His appeal is against the severity of the penalty.

It is common ground that the appeals should be heard and determined together.

The Appellant, who was represented at the hearing of the appeals by Mr Des O'Keeffe, the General Manager of the AJA (Australian Jockeys Association), relied upon two main grounds. First, the penalties should have been moderated to reflect the fact that the track was not prepared in accordance with ARB (Australian Racing Board) policy that the running rails be painted in a different colour at and from the 100 metre mark. And second, the penalties were excessive because they did not reflect TRSA (Thoroughbred Racing SA) penalty guidelines and in any event were disproportionate to the gravity of the offending.

As to the first main ground, I should say at the outset that, having read the transcript, viewed the vision of the races and consulted with my colleague, I am of the opinion that the appellant's use of the whip well in excess of the allowable maximum on each occasion reflected an intentional or at least reckless disregard of the whip rules by him well before the last 100 metres of the race, and that he was not compromised or influenced on either occasion by the lack of any satisfactory identification of the 100 metre mark.

So, as a matter of strict logic, any ARB policy with respect to identification of the 100 metre mark can have no bearing on the outcome of the appeals. But since the issue was debated at some length on both sides, I will make some remarks about it.

A media release issued by ARB on 15 September 2009 (the copy presented to me was not on ARB letterhead) states, amongst other things:

"Sign posts not considered adequate by themselves. Colouring of running rails for last 100 m to be implemented".

Another release of the same date (this was on ARB letterhead) refers to changes to the whip rules agreed with the AJA but makes no mention of the need to colour the running rails.

The Chairman of Stewards said he had no knowledge of the first mentioned release, and tendered emails between 18th and 21st September 2009 to and from the secretary of the ARB to show his state of mind at the time. On 18th September 2009, the secretary wrote:

“As you will be aware painting the inside and outside running rails to identify the last 100m is one of the items that came out of the negotiations with the AJA. A coordinated approach to implementing this would seem desirable”.

The remaining emails in that period discussed the colour to be used and whether ~~it would be necessary to paint the entire 100 metres.~~

A media release of 23rd September 2009 refers to further changes made by the ARB to the whip rules following recommendations received from a specially established panel (otherwise described as “the whip rules panel”) and foreshadows 26 September 2009 as the date of operation. These are the changes that are currently in force. Again this release makes no mention of the need to colour the rails.

If the final view of the ARB on the matter of the colouring of the running rails is as mentioned in the first abovementioned media release, and if it is correct to describe that view as “ARB policy”, the policy can have no practical relevance to the conduct of racing in South Australia until it is adopted by TRSA as the Principal Racing Authority in South Australia. The principal racing authority of each State and Territory is vested by the Australian Rules of Racing with the responsibility for, to use the words of AR.7 (ii), “the control and general supervision of racing within its territory”.

~~My own enquiry of TRSA discloses that there has been an in principle acceptance by both ARB and TRSA of the need to colour the running rails, but that issues of implementation, especially as to colour, have yet to be finalized.~~

I do not accept the first main ground of appeal.

As for the second main ground, penalty guidelines for breaches of the whip rules apply in South Australia. The ARB’s media release of 15 September 2009 (the one on ARB letterhead) states that the ARB and the AJA have agreed that a panel should be appointed to review penalties. This is the whip rules panel already mentioned. On 23rd September 2009, members of the ARB met by telephone, noted the written report of the panel, resolved to adopt new whip rules, and resolved also to endorse revised penalty guidelines and to encourage each principal racing authority to adopt them. A document tendered by the Chairman of Stewards contains guidelines that were provided to all riders before

the meeting on 26th September 2009. The document begins with the following headings above various tables:

TRSA Limited Rider Penalty Guidelines

Applicable from Saturday, 25 September, 2009.

To be used as a guide only with all circumstances of the breach and the rider to be considered.

Since the charge on 3rd October 2009 in effect alleges two breaches (and I will say more about that in a moment), two tables in the document need to be consulted. According to the table headed "Prior to 100 Metres – Successive strokes", the guideline penalty for four plus successive forehand strokes (second offence) is "On merit – Fine \$250 +" and, according to the table headed "Prior to 100 Metres – Additional strokes", the guideline penalty for four or less offending strokes (second offence) is "On merit – Fine \$250+".

The table relevant to the charge on 5 October 2009 is the one which is headed "Prior to 100 Metres – Additional strokes". According to that table, the guideline penalty for more than five offending strokes (second offence) is "2/4 Mtgs".

The following dot points on the back of the document were also relevant to the Stewards' deliberations:

- Any breach considered by Stewards to be egregious and/or wilful may result in a penalty imposed which has relevance (sic) to the riding fee and/or percentage of prizemoney earned.
- The Stewards provide notice to riders that, where the circumstances of an offence or the consequences of a rider's action is considered to be a flagrant breach of the rules, and therefore may warrant a more severe penalty, the right to apply discretion outside the confines of the Penalty Guidelines shall be reserved.
- A rider who enters a "guilty plea" **immediately** upon being informed of a charge under ARR 137A shall receive consideration in the form of at least 20% of any fine imposed or 1 meeting relief to any penalty.

Mr O'Keeffe told me that the whip rules panel also recommended that all riders in breach of the whip rules for the first time after 26 September 2009 should receive a "clean slate", that is, they should be treated as a first offender with respect to excessive use of the whip. The penalty guidelines provided to the riders make no reference to this recommendation. The appellant's record contains a breach of the whip rules on the day they were introduced, 1st August 2009, but the Stewards chose to treat him as a second offender on 5th October as well as on 3rd October.

The guidelines do not call for slavish adherence. The Stewards must take the guidelines into account, and then in the exercise of their discretion give due weight to the gravity of the offending, the Appellant's record and personal circumstances and any other factors that may be relevant to the particular case.

Having reviewed the transcript of the hearing before the Stewards, I have no reason to conclude that they misunderstood or misapplied either the penalty guidelines or their discretion to vary or depart from the guidelines in the particular circumstances of an individual case.

The fine of \$500 for the offences on 3 October 2009 is consistent with the guidelines, and properly reflects the number and the intentional or reckless nature of the unauthorized uses and the fact that the Appellant was a second offender. Moreover, I have no reason to disbelieve the Stewards when they said they had taken his plea of guilty into consideration.

Although the suspension of three meetings for the offence on 5 October 2009 is also consistent with the guidelines for a second offender, I am of the view in any event that the penalty properly reflects the number and intentional or reckless nature of the unauthorized uses and the important further point that a greater ~~element of deterrence was required by the fact that the offence followed so soon~~ after the fine that was imposed on 3 October 2009.

Mr O'Keeffe submitted that the Appellant did not receive credit for the fact that his ride on 3rd October was only his tenth ride after 26th September when the current rules came into force. The Chairman of Stewards took me through the information program that was delivered by the Stewards to the Appellant and other jockeys prior to 3rd October. Although lack of familiarity with or experience of the new whip rules were probably not factors in the Appellant's breaches, I have no reason to disbelieve the Stewards' assertion at the hearing on 3rd October that they took into account the fact that the Appellant had not had a lot of time to adjust.

Mr O'Keeffe submitted that the three meeting suspension on 5th October was disproportionate to the breach. He said that the resultant loss of earnings for the Appellant would be between \$4000 and \$4500, and that the penalty effectively elevated whip offences to the level of careless riding offences where the underlying concern is the safety of rider and horse. Mr O'Keeffe relied upon a ~~decision of the Racing Appeals and Disciplinary Board in Victoria on 5th October 2009 in the matter of Craig Williams for the proposition that whip offences are related to perception, and therefore are much less serious than careless riding offences.~~ Although doubtless perception was a factor in the formulation of the whip rules, for myself I would have thought that the underlying concern was the welfare of the horse, and that in the more serious of cases suspension would be justified.

Also with respect to the level of penalties for breaches of the whip rules, sub-rule (2) of AR 196 is worth noticing. According to sub-rule (1), the penalty options available to the Stewards generally for a breach of the rules are disqualification, suspension, reprimand, or a fine not exceeding \$75000. Sub-rule (2) provides:

(2) In respect of a breach of AR137A the Stewards may in addition to the penalty options conferred on them under sub-rule (1) of this Rule order the forfeiture of

the rider's riding fee and/or forfeiture of all or part of the rider's percentage of prizemoney notwithstanding that the amount exceeds \$75000.

I do not accept the second main ground of appeal.

Before concluding, I refer to a point of procedure which arises in relation to the first charge. Sub-rule (5) (a) (i) and (ii) of rule 137A creates separate offences: part (i) relates to use of the whip in consecutive strides and part (ii) relates to use of the whip on more than five occasions. Where, as happened here, the Stewards decide to allege a separate offence under each part in relation to separate uses of the whip, they should make each offence the subject of a separate charge. That would enable the jockey to enter separate pleas and each charge could then be dealt with separately or together as the Stewards saw fit. Nothing turns on the point in the particular circumstances of the Appellant's case, because his plea of guilty was clearly directed to both offences and there was no ~~unfairness to him in the way that his plea was subsequently handled.~~

The formal determination is that each appeal be dismissed and that the bond be refunded to the Appellant.

I order that the 3 meeting suspension, the subject of the second charge, shall commence at midnight on Saturday, 28th November 2009.